No. 15829

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC., a corporation,

Appellant,

vs.

AMERICAN MAIL LINE, LTD., a corporation,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon

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STATEMENT OF PLEADINGS AND BASIS FOR JURISDICTION

This is an appeal from a final judgment of the United States District Court for the District of Oregon. This is an action, brought on the law side, for idemnity by a ship operator against a ship repair yard. Indemnity sought is for loss and expense incurred by reason of injuries to seamen employed by the vessel. Appellate juris-

diction is granted to this Court by Title 28, Section 1291, USCA. The trial court had jurisdiction by reason of the diversity of citizenship of the parties and the amount in controversy, exclusive of interest and costs, exceeding the sum of $3,000.00.

STATEMENT OF THE CASE

The plaintiff, appellee, hereinafter referred to as American Mail, is a Delaware corporation and owns and operates ocean-going vessels, including the JAVA MAIL. The appellant, defendant, Albina Engine & Machine Works, Inc., hereinafter referred to as Albina, is an Oregon corporation and operates a ship repair and ship building yard in Portland, Oregon, on the Willamette River.

The JAVA MAIL was up for her annual inspection and needed voyage repairs (Tr. 198). Specifications for repairs were prepared, bids were taken, and the appellant was the low bidder, and the work was awarded to the appellant (Tr. 199).

On or about April 6, 1955, the Coast Guard notified the appellee that they wanted to weight test the lifeboats and Mr. Toole, then the port engineer for the apellee, verbally told Mr. Bailey, repair superintendent for the appellant, that the Coast Guard wanted a weight test on the lifeboats and asked Albina to take care of it. Subsequent to the accident, American Mail prepared written specifications on this.

The weight test was performed on April 7, 1955, and subsequently on that day the lifeboat fell, causing injuries to two crew members, Nelson and Yee. Appellee settled litigation brought by these crew members for their injuries against both American Mail and Albina and it is for appellee's loss and expense caused by these injuries that the appellee in this litigation seeks indemnity from the appellant. There was no indemnity agreement between the parties.

Subsequent to April 7, 1955, the appellee drew up supplemental specifications, one of which specifications was for weight testing lifeboats. The supplemental specifications are a portion of appellee's Exhibit 3 and, while they are dated April 7, 1955, there is no question but that they were actually prepared after April 7th (Tr. 49). The particular specification in question is on Page 2 of Supplement No. 1, appellee's Exhibit 3, Item No. 30, stating:

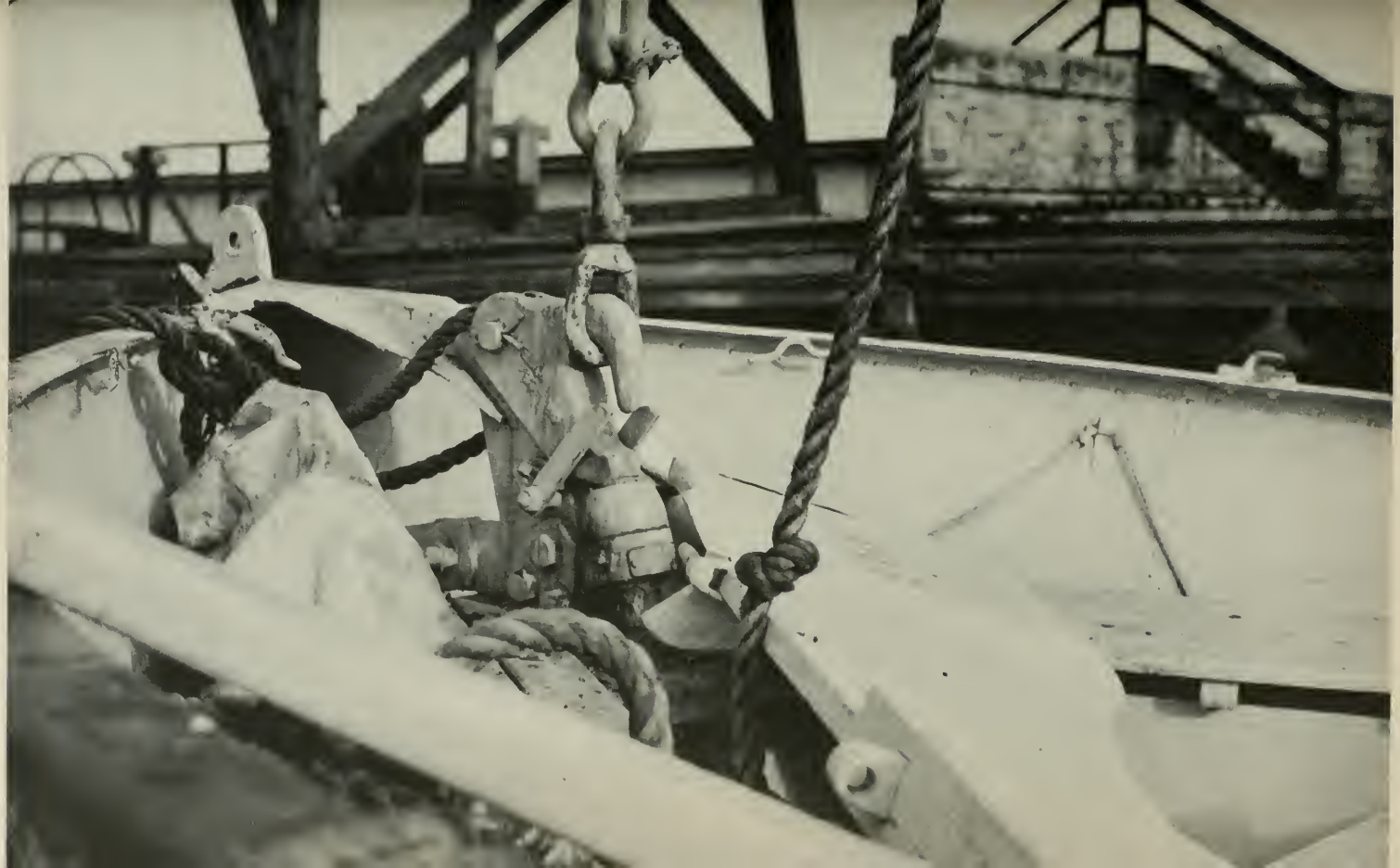
> "WEIGHT TESTING—PORT AND STARBOARD LIFEBOATS AND EQUIPMENT. Furnish weight, 165# per person for 66 person capacity, and accomplish weight test of each of the port and starboard lifeboats, cables, davits, etc. NOTE: To be accomplished to satisfaction of U.S.C.G."

This weight test was required pursuant to Coast Guard regulations Section 91.25-15 which provides:

> "At each annual inspection the inspector shall conduct the following tests in inspections of lifesaving equipment. * * *" (Appellee's Ex. 1, Tr. 119).

Pursuant to the verbal order regarding the weight test, on the morning of April 7, 1955, Albina had some

sacks of sand available. Under the regulations it was required that the boat be loaded with persons or deadweight equal to the allowed capacity of the lifeboat, considering persons to weigh 165 pounds each (Appellee's Ex. 1, Sec. 91.25-15(a)(2); Tr. 119). The lifeboat, with witnesses John Stene and Leslie Becvar in the boat, was brought around from its position to a place alongside the ship where sandbags were put aboard. After the sand was in the boat, the two Albina employees took it back underneath the falls and hooked it up (Tr. 151). Then, with the Albina men remaining in the boat, the boat was lifted with the weight in it. The Coast Guard inspector indicated his satisfaction and the boat was lowered again, released from the falls, taken back to the place where the sand could be discharged, and then brought back again under the falls (Tr. 152). The boat was again hooked up by the Albina employees and after being raised and then lowered again, the Albina employees left the boat while it was bobbing in the water (Tr. 61). Sometime subsequently, it was raised out of the water, swung into its cradle and the gripes put on (Tr. 125). All the raising and lowering of the boat was done by ship's personnel (Tr. 78).



The lifeboat was raised or lowered on cables known as falls. On this particular boat at the end of the falls there were several metal links and at the end was a metal link or ring. The boat was attached to the falls by this metal ring being slipped over a metal hook, sometimes called a pelican hook, which hook was attached to the lifeboat, one being in the front and one being in the rear. The hook was supposed to be disengaged from the ring by moving back so that the point of the hook was in a horizontal plane rather than a vertical plane (Tr. 143). The hook was part of what was known as a releasing device. When this releasing device was closed, the hook could not move backwards and release the ring. When it was open it moved the hook back so that the ring could be released (Tr. 59). To prevent the ring from slipping out of the hook when there is no tension on the falls, there were two metal finger guards or keepers, the ends of which are near the point of the hook and when in proper size and condition did not allow enough space at the point of the hook for the ring to slip off. Both parties concede that, at the time of the accident, the ring, with the releasing gear closed and no tension on the falls, could slip over the hook and the keepers or guards would not prevent this (Tr. 55 and 62). While there has been no formal admission, it also appears unmistakably that, if this condition had not existed, the accident would not have occurred.

Sometime after 10:00 o'clock on April 7, 1955, the ship held a boat drill. The third mate, Patterson, was assigned in charge of the starboard lifeboat although it normally was the second mate's boat (Tr. 155, 168).

Patterson assigned certain men to the starboard lifeboat, not the men who usually were in the starboard lifeboat (Tr. 135). Two sailors so assigned, Hinrichs and Nelson, got in the lifeboat on the boat deck. No one checked, or was asked to check, the falls (Tr. 162). The boat was lowered to the next deck, the cabin deck, and it was discovered that the rudder was not in the boat so the boat was stopped. While Mr. Patterson went to get the rudder, two other men, Chan Yee and Flovik got into the boat (Tr. 189). The boat was started up when it was noticed that the ring was not secure in the hook but was resting on the point, and immediately after that the boat fell, and Nelson and Yee suffered injuries.

As the pre-trial order states (Tr. 28), Nelson and Yee sued American Mail Line and Albina for their injuries, but later took a voluntary non-suit as to Albina. American Mail Line, after first notifying defendant, Albina, that it was about to do so and would hold defendant liable by way of indemnity, settled the Nelson case for $35,000 and the Yee case for $6,750. These cases are brought to recover this loss, American Mail's expense in repairing the lifeboat, in the amount of $3,683.01, maintenance paid Nelson and Yee, for Nelson $1,688 and for Yee $124, and for American Mail's attorneys fees in defending both cases in the total amount of $2,100. The total amount sued for by American Mail Line and the amount awarded by the trial court was $50,045.01.

SPECIFICATIONS OF ERRORS

Appellant contends that the trial court erred in the following particulars:

1. In finding that American Mail Line and Albina entered into a contract by which Albina was to make weight tests on the port and starboard lifeboats of the JAVA MAIL and their equipment and that it was an obligation of Albina under said contract to report to the plaintiff any defects discovered in said equipment (Findings of Fact No. 5; Tr. 34-35).

2. In finding that the defendant breached its contract with the plaintiff concerning the JAVA MAIL in that defendant discovered that said equipment was dangerous and did not report this fact (Finding of Fact No. 6; Tr. 35).

3. In finding that the plaintiff, American Mail Line, did not know of and had no reason to suspect the existence of said defect (Finding of Fact No. 7; Tr. 35).

4. In finding that American Mail Line was not negligent nor at fault for not inspecting the swivel and hook keepers before commencing the boat drill and was not otherwise negligent in any respect (Finding of Fact No. 9; Tr. 36).

5. In making the legal conclusion that Albina breached its contract with the plaintiff and that judgment for the plaintiff and against the defendant should be entered (Conclusion of Law; Tr. 37).

ARGUMENT

SUMMARY OF ARGUMENT

The appellant contends that it did not breach any contract it had with American Mail as such contract did not require it to inspect the lifeboat for defects nor report defects which were discovered and which were apparent and obvious. It also contends that it had no legal duty, apart from contract, to report a defect which was open and obvious. Not having breached any contract with American Mail nor having breached any duty imposed by law, Albina is not obligated to indemnify American Mail. Further, American Mail Line was negligent to Nelson and Yee and such negligence was the proximate cause of their injuries. Such negligence consisted of permitting the defect to exist and failing to have it corrected and, secondly, in failing to examine the linking of the falls to the lifeboat before permitting Nelson and Yee or any other sailors or persons to get into the lifeboat. American Mail also breached a duty to Nelson and Yee in failing to furnish a seaworthy vessel. American Mail Line itself being negligent, and otherwise liable, cannot recover indemnity from Albina because, even if Albina had breached the contract and was negligent, American Mail would at least be a joint tort feasor and, therefore, not entitled to indemnity.

FIRST, SECOND AND THIRD SPECIFICATIONS OF ERRORS

The court erred in finding that:

"Plaintiff and defendant entered into a contract by which defendant was to make weight tests on the port and starboard lifeboats of said JAVA MAIL and their equipment, including the cables, davits, etc. * * * It was an obligation of defendant under said contract, in making tests of the equipment, to report to plaintiff any defects discovered in said equipment, so that plaintiff could give the necessary orders to have them repaired.." (Finding of Fact No. 5; Tr. 34-35).

The trial court further erred in finding:

"Defendant breached its said contract in this, to wit: In making the test on the starboard lifeboat and its equipment, defendant discovered that the said equipment was defective, faulty and dangerous, in that the swivel link could slip out and become disconnected from the said hook even when the releasing gear was locked, thus permitting that end of the boat to fall, but did not report said dangerous defect to plaintiff, nor take any steps whatever to correct it." (Finding of Fact No. 6; Tr. 35).

The trial court further erred in finding:

"Plaintiff did not know of and had no reason to suspect the existence of said defect." (Finding of Fact No. 7; Tr. 35).

ARGUMENT

The first and second specifications of error both deal with the same problem, what were defendant's duties, if any, in regard to the defect and the third specification,

knowledge, is intertwined. For this reason the argument on the three specifications is combined.

It is uncontradicted that about April 6, 1955, after Albina had started to work on JAVA MAIL, Mr. Toole, the port engineer for American Mail, told Mr. Bailey, the ship repair superintendent for Albina, words to the effect that the Coast Guard wanted to weight test the lifeboats and would Albina take care of this.

After the accident, American Mail drew up the following specification:

> WEIGHT TESTING—PORT AND STARBOARD LIFEBOATS AND EQUIPMENT. Furnish weight, 165# per person for 66 person capacity and accomplish weight test of each of the port and starboard lifeboats, cables, davits, etc. NOTE: To be accomplished to satisfaction of U.S.C.G."

Plaintiff contends, and apparently the trial court found, that the contract between American Mail and Albina was that Albina was to make the test on the lifeboats, the cables, davits, etc., and determine whether or not the lifeboats and equipment passed the weight test. (Pretrial Order; Tr. 28-29; Contentions of Plantiff). Plaintiff further contended that as a part of conducting said weight test, Albina had the contractual duty to inspect the lifeboat equipment for defects, report any defects found and repair the defects found (Pretrial Order; Tr. 29-30). The Findings of Fact are framed broadly; however, the trial court did find, or more accurately conclude as a matter of law, that Albina was obligated under its contract to make the weight test, and as a part thereof, to report defects found so American Mail could order such defects repaired.

It seems obvious to the appellant, and the appellant so contends, that weight testing was the function of the U.S.C.G. and that all Albina was to do was to get the sand, put it in the lifeboat and, when the Coast Guard was finished, take it off. The conducting of the weight test and inspection of the lifesaving equipment, as well as the rest of the annual inspection, was conducted by the Coast Guard under the provisions of 46 USCA Sec. 391 which provides that the Coast Guard shall inspect once each year the hull of every steam vessel and "determine to its satisfaction that every such vessel so submitted to inspection * * * is in a condition to warrant the belief that she may be used in navigation with safety to life." Pursuant to this statute, the Coast Guard promulgated rules and regulations for cargo and miscellaneous vessels (Plaintiff's Ex. 1; a portion is printed on Tr. 119-120). Section 91.25-5 provides:

> "The annual inspection will only be made upon the written application of the master, owner or agent of the vessel on Form CG-833, to the Officer in Charge, Marine Inspection * * *."

Section 91.25-10 provides:

> "The inspection shall be such as to insure that the vessel as regards the * * * lifesaving appliances * * * is in satisfactory condition and fit for the service for which it is intended, and that it complies with the applicable regulations for such vessel, * * *."

Section 91.25-15, lifesaving equipment, provides:

> "(a) At each annual inspection, the inspector shall conduct the following tests and inspections of lifesaving equipment.
>
> "(a)(2) If practicable, each lifeboat shall be lowered to near the water and then be loaded with its

> allowed capacity, evenly distributed throughout the length, and then be lowered into the water until it is afloat, and be released from the falls. In making this test, persons or deadweight may be used. The total weight used shall be at least equal to the allowed capacity of the lifeboat considering persons to weigh 165 pounds each."

Section 91.25-15, lifesaving equipment, further provides for particular inspections by the inspector of life preservers, winch electrical control apparatus and "all other items of lifesaving equipment."

As Capt. Endresen, the Coast Guard inspector, testified, he was the inspector referred to in the above-quoted regulations (Tr. 96-97). The statutes requires that the Coast Guard conduct the tests and make the inspections. All the ship repairer or the ship's personnel do is to furnish the means for conducting the test or make the equipment open or available so the inspection can be made. Albina's contract certainly did not call for any inspection of the equipment to be tested or the making of any tests and the whole record makes it seem fairly apparent that American Mail was not relying upon Albina to conduct any tests or make any inspections. A review of the specifications, Supplement No. 1, indicates many items concerning the lifeboats which American Mail specifically requested Albina to perform and the reason for the request was that the Coast Guard required it (Pltfs. Ex. 3). An example of this is an item found on page 3 of Supplement No. 1 stating:

> "RUDDER—STARBOARD LIFEBOAT Unbolt, repair and re-bolt the one (1) faulty starboard lifeboat rudder. NOTE: requested by U.S.C.G."

The purpose of the weight test was not to determine whether or not the releasing gear was working correctly. Capt. Endresen stated:

> "The weight test is an annual test conducted to find out if the davits, falls, blocks and so on are strong enough to stand the weight of the boat and equipment, the number of persons times 165 pounds, which gives the total weight of the boat when loaded, fully loaded."

Probably the inspection of the releasing gear and its appurtenances would fall under that provision of the regulations providing that all other items of lifesaving equipment shall be examined by the Coast Guard inspector.

Mr. Toole, the representative of American Mail, knew that Albina was not required under their contract to make the weight test and was not required to make any inspection of the lifeboat. He stated:

> "Q. As the Port Engineer, do you consider it the duty of the repair yard in conducting a weight test —not conducting it, but trying it for the Coast Guard—to examine the ring, for example, and the hooks to see whether or not it is possible for the ring to become disengaged when it is resting in the water?
>
> A. No, their responsibility is to report anything they do see wrong to me." (Tr. 219).

Albina's contract with American Mail in regard to the weight testing did not contemplate conducting a test, or making an inspection or examination for defects.

Having no duty to test, examine or inspect, the question is then raised, did Albina have any duty to report to American Mail the fact that Stene observed that the

ring from the falls, when on slack, could be passed under the hook despite the presence of the guards or keepers. It is the appellant's contention that Albina did not have such a duty, and that such duty could neither be implied as a part of the contract Albina had with American Mail, nor was it a duty implied in law.

Section 403, Restatement of the Law, Torts, Negligence, states:

> "One, who as an independent contractor, makes, rebuilds or repairs a chattel for another and turns it over to the other knowing that his work has made it dangerous for the use for which it is turned over is subject to liability as stated in Sections 388 to 390."

The above-quoted language, of course, is not applicable to the present case as the plaintiff, as shall be stated in more detail later on, has virtually dropped the claim that Albina created the dangerous condition, and the trial court did not so find. This particular section, however, has a statement that is applicable. The Institute stated at the end of the comments concerning the above-quoted Section 403 as follows:

> "Caveat: The Institute expresses no opinion that a contractor, who fails to exercise reasonable care to inform his employer of a dangerous condition, which he is not employed to repair, but which he discovers in the course of making the repairs agreed upon and of which he realizes that his employer is unaware, may not be subject to the liability stated in this Section."

Paraphrasing the above quotation, the Institute is not taking a position upon the liability in a situation in which a contractor has not contracted to perform repairs

on a certain device, but in the course of making repairs upon other equipment of the employer, he discovers a dangerous condition in the device, which he knows the employer is not aware of, and fails to report the dangerous condition in the device.

The present set of facts differs from the facts set out in the above caveat in one aspect.

The caveat conditions its statement upon a dangerous condition "of which he (independent contractor) realizes that his employer is unaware." Clyde Toole, the port engineer for American Mail at the time, stated:

> "Q. Was that condition that you saw there, Mr. Toole, one that was quite open and apparent when you looked for it?
>
> A. When you looked for it, yes, it was very apparent that it would fall out.
>
> * * *
>
> Q. Am I correct, Mr. Toole, that anybody that looked at this hook, ring and guard would see that the guard was in such a position or the ring was of such size that you could slip it out despite the guard being there?
>
> A. It was apparent that that would occur, yes." (Tr. 55-56).

John Stene, Albina employee who noticed that the ring could slip out over the hook, stated that he had noticed the condition "When I first stepped in the boat at the boat deck and rode the boat down." (Tr. 64). Stene further stated:

> "Q. You realized that this was really a defect in the equipment, didn't you?
>
> A. Well, I have seen on shipboard a lot of lifeboats with the same hook-up. The only thing you

> have to watch there is that first you take it up so you get your lines taut and then you proceed—your link should be right up in the bight of that hook, and the line will be tight." (Tr. 63).

With this testimony it cannot be found that Albina could believe that American Mail was unaware of this condition. It was open and apparent.

The problem raised by the caveat was discussed by the Supreme Court of Pennsylvania in *Wissman vs. General Tire Co. of Philadelphia,* 327 Pa. 215, 192 Atl. 633 (1937). The facts in this case were that the defendant tire company equipped a truck with new tires. One of the rims and the lock ring of the rim were cracked. The defendant tire company noticed the defect and informed the driver of the company owning the truck. Three days later the company took its truck to White Truck Company for a brake adjustment and while a White employee was removing the wheel, the employee was injured when the lock ring burst by reason of the defect.

The Court stated:

> "Under the circumstances of the present case, the most that could possibly be required of the defendant was notice to the owner of the vehicle of the defective condition. Indeed, it may well be that a contractor employed to make repairs is under no duty to inform his customer of a dangerous condition which he has not been employed to repair but which he discovers in the course of making repairs agreed upon."

The relationship of the parties was different in *Weinfeld vs. Caplan,* 282 N.Y. 348, 26 N.E. 2d 287 (1940), but the decision on the duty to warn is applicable. In

this case the landlord agreed to have certain heating work done on the premises and the tenant to have the painting done. The plaintiff was doing the painting and:

> "Employees of the heating-contractor removed the cover from a register in the floor over the hot-air furnace and the plaintiff fell through the unguarded opening and was hurt * * *. When the register grating was removed, the plaintiff was away from the premises on an errand. In his absence, the tenant came to the premises and saw the hole theretofore made in the floor by the employees of the heating contractor. Before the plaintiff returned, the tenant had left the premises and was not there when the accident occurred. Under those circumstances the plaintiff, we think, had no right to complain of the mere failure of the tenant to warn him against the possibility of a continuance of the condition created by the independent heating-contractor on property controlled by the landlord."

A case in this Court, arising in the District Court in Oregon, *Ove Tysko vs. Royal Mail Steam Packet Co.,* 81 F. 2d 960 (1936), involved the same general problem of when a notice or warning of a defective condition is necessary. In that case, a portion of the hatch was open and covered with dunnage. The plaintiff was a longshoreman employed by the stevedore and he fell through the opening in the hatch. The court said at Page 962:

> "In 45 C.J. 877, it is said: 'The general rule is that, where proper notice or warning is given, defendant is relieved from liability for injuries received by those who do not heed it, unless disregard thereof is invited, or acquiesced in, by defendant. * * *' See also, *Seas Shipping Co. vs. Ward* (CCA 9) 22 F. 2d 251, 252. Because appellant had actual notice of the danger, appellee was not required to give notice or warning. 45 C.J. 876."

In the case just above-quoted, the court found that the longshoreman had actual notice of the condition. The evidence in the present case is such that there is a reasonable inference that American Mail, through its employees, probably knew of this condition. In any event, they certainly should have known of its existence. The condition had existed for some time (Tr. 81); the condition was obvious (Tr. 55-56).

A general statement of the rule as to when warning of defect must be given is stated in *Atlantic Coast Line vs. Anderson,* 221 F. 2d 548, 553 (CA 5th), reversed on other grounds 350 U.S. 807; 76 S. Ct. 60:

> "The law is well settled that there is no duty to warn of known or obvious dangers and no negligence, therefore, in failing to do so."

As shown previously, Albina had no contractual duty to inspect or warn of any defective condition. Albina also had no duty implied in law to warn of any condition found, particularly when the condition was open and obvious, had existed for a substantial period of time, and appeared to be a condition that was well known to American Mail.

FOURTH SPECIFICATION OF ERROR

The trial court erred in finding (and in effect concluding as a matter of law) that:

> "Plaintiff was not negligent nor at fault for not inspecting the swivel and hook and keepers before commencing the boat drill, and was not otherwise negligent in any respect." (Finding of Fact No. 9; Tr. 36).

ARGUMENT

As regards the two injured men, Nelson and Yee, American Mail was culpable. The basis of culpability is not clear. American Mail alleged in its amended complaint (Tr. 21-22):

> "The liability of plaintiff to said Benjamin E. Nelson arose under what is known as the Jones Act, for failure to furnish a safe place to work, and other causes actionable under said Act, * * *."

In the pre-trial order (Tr. 30), the agreed facts simply state:

> "That under the admiralty and maritime law and the Jones Act, plaintiff was liable to Nelson and Yee, not only in damages, but for their maintenance and cure, * * *."

The trial court, on the basis of nothing but the pleadings and the pre-trial order found (Tr. 36):

> "The said two men (Nelson and Yee) commenced actions at law in the state court, which were removed to the United States District Court for Oregon, to recover damages for their said injuries because of the unseaworthiness of the said lifeboat, * * *."

It is an obvious error that the findings state the actions were removed to the United States District Court. They remained in the state court and were not removable. This is partially substantiated by the language in the releases (Tr. 191). There is nothing in the evidence on which the court could find either that the sole basis of recovery was unseaworthiness or that it was something else.

American Mail Line was clearly negligent in two respects: (1) In permitting this defect to exist when the

plaintiff either knew, or because of the existence of the defect over a period of time, should have known existed. (2) In permitting the two injured persons to enter and remain in the lifeboat without inspecting the falls, which inspection would have readily shown the danger. The facts concerning these two charges of negligence made by Albina in the pre-trial order (Tr. 31) were not in controversy. It is not a factual question that is in controversy. The only issue here is whether or not the trial court erred in concluding that the admitted facts did not amount to negligence.

The condition of the ring, hook and keepers was open and obvious to American Mail Line (Tr. 55-56). This condition did not appear to be of recent origin as the parts had not been twisted or bent (Tr. 81).

American Mail Line, under the Jones Act, had a duty to provide a safe place to work and safe appliances with which to work for Nelson and Yee; *Kunschman vs. U.S.,* 54 F. 2d 987 (CA 2nd, 1932). This duty under the Jones Act was to use due diligence to provide such a safe place; *The Cricket,* 71 F. 2d 61 (CA 9th, 1934). Due diligence is not shown when the vessel operator knows or should know of the existence of a defective condition and an unsafe place to work. *Waller vs. N.P. Terminal Co. of Oregon,* 178 Ore. 274, 166 P. 2d 488 (1946); Cert. denied 329 U.S. 742, 67 S. Ct. 45.

There is no factual controversy, American Mail as a matter of law knew or should have known of the condition of the ring, hook and keepers. In not correcting this condition or warning Nelson and Yee of this condition,

American Mail is negligent, both under the common law and under the Jones Act.

American Mail Line initially charged that Stene and Becvar, Albina's employees in the lifeboat, did not properly insert the ring over the hook when they left the boat (Tr. 18, 30). During the trial, counsel for American Mail conceded that Albina probably did not leave the ring and hook improperly emplaced (Tr. 112). The trial court did not find that Albina improperly emplaced the ring and hook when they hooked up to the falls the last time and left the lifeboat.

The testimony is that just before the boat fell the ring from the fall was balancing on the point of the hook (Tr. 128). The testimony also was that the ring would remain in its proper place in the hook as long as tension was thereafter kept on the falls (Tr. 211). American Mail's testimony was that there was tension on the falls from the time the boat was lifted out of the water soon after Albina left until the accident (Tr. 211-212), including the period during which the boat was in its cradle and gripped in (Tr. 126, 156). Certainly there was heavy tension (two ton) (Tr. 156) on the falls from the time it was swung out from its cradle until the accident. Hinrichs was ordered into the boat by Patterson, the mate, just after the boat was swung out from the cradle (Tr. 126-127). According to the testimony and the laws of physics, the ring must have been riding the point of the hook when the boat was swung out of its cradle. The most reasonable inference is that the ring slipped out of its correct position in the hook while the boat was

on the water after the Albina men had left it. The boat was bobbing in the water and was brought up later by the ship's crew (Tr. 61, 63).

In any event, when the lifeboat was swung out from its cradle and at the time Nelson got in and later Yee, the ring was riding the point of the hook; a most dangerous condition. This condition was most obvious; Hinrich and Flovik both saw it without any detailed inspection (Tr. 128, 189). Patterson or anyone to whom he delegated the job could have seen it by casual inspection. Patterson testified that he didn't have to inspect this type of releasing gear (Tr. 162, 174). Capt. Dopp, on the other hand, stated it was the duty of the person in charge of the boat to see that it was properly hooked up and a sailor stationed at the fore and aft falls with the duty of seeing that it was properly hooked up and the falls clear (Tr. 107).

The testimony of the mate and Capt. Dopp was immaterial. Whether or not inspection of equipment, here the lifeboat hook-up, was required of the vessel operator is not a factual question. The law requires a vessel operator to make a reasonable inspection of equipment to be used by the crew and a failure to make such inspection is a violation of the Jones Act and negligence as a matter of law. How careful an inspection should be made could be a fact question, but here it cannot be because a most casual inspection would have revealed the condition.

Judge Learned Hand and the court in *Vanderlinden vs. Lorentzen,* 139 F. 2d 995 (CA 2nd, 1944), were con-

cerned with the problem of inspection and indemnity. In that case a "business visitor" brought an action for injuries against the ship operator and the stevedore. The stevedore sought indemnity from the ship owner. The plaintiff was injured when a rope ladder broke. The ladder was ship's gear, but it was put over the ship's side by the stevedore. The stevedore did not inspect the rope ladder, which ladder was rotten, claiming that it was not customary for the stevedore to make such inspection. The court held that the stevedore did have a duty to a business visitor to inspect the rope ladder. The trial court charged the jury in regard to the stevedore's liability:

> "If 'an ordinary look at the coil ladder * * * would have put a reasonable man on notice that the ladder was defective' that would charge the stevedore. But if the 'defect would not be apparent on an ordinary looking at it,' they were to 'consider the evidence of custom * * * that stevedores always accept the ladder as they get it * * * and merely * * * drop it overside.' "

The appellate court stated:

> "Such an acceptance might not be reasonable; the custom was not final; in the end they must decide what degree of inspection was reasonable care. * * * We hold that both defendants were under a duty to use reasonable care to see that the plaintiff had a safe approach to the deck of the lighter: i.e., that the ladder is safe * * * a custom exonerating the stevedore from all need of examining a ladder down which its employees or 'business visitors' must descend, would be so 'unreasonable' as to be unlawful without more. The jury might disregard it altogether; indeed the Judge could probably have done so himself. Prima facie, therefore, the defendants were joint tort feasors, since each failed to inspect the ladder as his duty demanded. As such, under

> well settled law, there could be no indemnity between them. * * * If that was the custom of stevedores (not to inspect the rope), it was a unilateral custom, which did not charge the ship owner; indeed, it was so wantonly reckless that only the plainest possible evidence should charge the ship owner with notice of it. He might rightly assume that the stevedore would make at least some inspection, and some inspection was indeed inevitable, for the stevedore could not use the ladder at all, without at least looking over the side to see if it was long enough to reach the lighter, or so long as to double on the deck. That much scrutiny would alone at once have disclosed the unfitness of the ladder at bar, whose ropes had in places been frayed so much as to be hardly more than string. The doctrine that there may not be indemnity between joint tort feasors is certainly desirable in a case like this, where the stevedore's fault was so much the greater of the two. It would be shocking to hold that the stevedore's 'reliance' on the ladder furnished was 'justifiable', and so to throw the whole loss on much the less reprehensible of the two wrong-doers."

This Court, in a case arising in the District of Oregon, has inferentially held the same as far as inspection is concerned. In *Kulukundis vs. Strand,* 202 F.2d 708 (CA 9th, 1953), the defect was that the hatch cover flanges were bent so that the hatch covers and strong backs did not firmly fit. A hatch cover dislodged and the libelant longshoreman fell into the hole. This Court stated:

> "The nature of the accident was similar to that in *The Redjacket,* D.C.E.D. Pa. 1900, 110 F. 224, where as here the strong back 'sprung out of line.' The Court said: 'It seems to me an irresistable inference that, if the hatch had been inspected, the defect would have appeared; and, certainly, if the

> defect had thus become known, as no attempt was made to remedy it, the negligence of the ship could scarcely be denied.' 110 F. at Page 226. This reasoning is equally applicable to the present case."

This Court passed upon a somewhat similar situation recently in another case in the District of Oregon, *Wiel Amundsen vs. Cotter,* 228 F.2d 351 (CA 9th, 1955). As the Court stated:

> "The District Court held that the Shipowner was negligent in failing to make tight a removable rod, a part of a fencing railing above the deck just forward of the open forehold, also making the vessel unseaworthy in that respect, * * *."

There simply could be no question but that the shipowner is negligent as a matter of law if, as to its employees, it fails to make any inspection of a device or appliance, such as the hook-up on a lifeboat.

FIFTH SPECIFICATION OF ERROR

The trial court erred in making the following conclusion of law:

> "The Court concludes that the defendant breached its contract with the plaintiff, and that as a result of said breach said plaintiff was damaged in the sum of $50,045.01, with interest at 6% per annum from December 5, 1955, on $41,871.01, and from July 3, 1956, on $8,174." (Tr. 37)

ARGUMENT

The court's conclusion that the defendant breached its contract has already been argued under First and Second Specifications of Error.

The court at no place directly concludes that American Mail Line is entitled to indemnity from Albina Engine & Machine Works, Inc. However, inasmuch as indemnity is the only basis on which plaintiff sought recovery, the court does conclude that the plaintiff is entitled to indemnity.

The appellant has pointed out in the argument in the past Specifications of Error that Albina was not guilty of any fault, either negligence or breach of contract and, therefore, it would not be liable to the plaintiff in indemnity. However, even if the assumption was made that Albina was at fault, American Mail is certainly not entitled to indemnity because it also had breached a duty it owed to injured crew members.

This Court has had several occasions in the recent past to take up this problem of indemnity. The basis of the doctrine was stated in *Amerocean S.S. Company, Inc. vs. Copp,* 245 F.2d 291 (CA 9th, 1957). The Court at page 294 stated:

> "When two parties, jointly and concurrently, breach the duty each owes to a third person and damage results to him, each is liable to the full extent therefor. Each had committed a wrongful act. Both are equally guilty of wrongful conduct. But one of such guilty parties has no right of indemnity or contribution from the other, if he has been held responsible in damages to the injured party. He cannot take advantage of his own wrong on the ground that the other is equally guilty. This doctrine is well established at common law and is followed in admiralty."

American Mail Line did breach a duty it owed the two injured men; it was guilty of wrongful conduct. It

so admitted in the pre-trial order (Tr. 30), and, of course, it paid the two injured workmen a total of $41,-750.00 in settlement of the damage claims. American Mail Line here has been guilty of negligence and is certainly not entitled to indemnity. Even if their only breach of duty was failure to furnish a seaworthy vessel, American Mail still would not be entitled to indemnity. The court in the *Amerocean* case stated:

> "The doctrine that the stevedore is liable in an indemnity action where the liability of the shipowner is established solely upon the grounds of unseaworthiness, while there is a finding of active negligence on the part of the stevedore, has been accepted in many Federal courts. The best considered decisions, however, limit the theory to a case where it is found on the facts that the duty existed on the stevedore to protect his employees from a highly dangerous appliance or condition, and the breach of such duty was the sole proximate cause of the injury."

This is not a case in which the ship repairer had a duty to its own employees to protect them from highly dangerous appliances or conditions, and certainly even if there was a breach of duty on the ship repairer's part, it was not the sole and proximate cause of the injury to Nelson and Yee.

Some of the principal recent cases on indemnity between a ship and a ship repairer or a ship and a stevedore are as follows:

Halcyon Lines, et al vs. Haenn Ship Sealing & Refitting Corp., 342 U.S. 282, 72 S. Ct. 277; facts in 89 F.S. 765 (D. Ct. E.D. Pa.). The stevedore previously installed "grain feeders" and the ship contracted with

the ship repairer to make the grain feeders "grain tight." Bacille, an employee of the ship repairer, went to work on staging, which was a part of the grain feeder installed by the stevedore. The staging collapsed, injuring Bacille. The ship settled with Bacille and instituted an indemnity or contribution suit against the ship repairer. The jury found the repairer 75% negligent and the ship 25% at fault. The trial court only discussed the negligence of the repairer which consisted of failure to inspect the condition of the cleats holding the staging and performing the work in an unsafe manner by directing Bacille to work on a staging thirty feet above the bottom of the hold when it would have been reasonably possible to work from a rope ladder from above and use a hatch cover to stand on. The United States Supreme Court held that, the ship being at fault in some degree, it could not recover against the repairer.

In *Halcyon,* the defect was created by the stevedore, —here it was created or suffered to occur by the ship. In *Halcyon* the ship ordered the repairer to make general repairs and the repairer failed to inspect the work he was to repair. Here it is denied that the repairer had any duty to repair or inspect, but certainly a failure to report a defect is no more culpable than a failure to inspect and find a defect. The ship here, unlike in Halcyon, had a further chance to avoid injury by performing its basic duty of checking the falls before lowering the boat; this the ship did not do and an injury occurred. *Halcyon* could not recover; *a fortiori* American Mail cannot recover.

Hawn vs. Pope & Talbot, Inc., 346 U.S. 406, 74 S. Ct. 202; facts from 198 F.2d 800 (CA 3rd). The repairer was making repairs to the grain feeder on the ship. Hawn was an employee of the repairer. Hawn slipped on loose grain in a poorly lit area of the ship and fell through a place where the hatch covering was missing. The loose grain was put aboard or was caused by the stevedore. The court held that the hatch cover was absent long enough to put the ship on constructive notice of its absence. The jury held both the ship and the repairer negligent and indemnity was denied the ship.

In *Hawn,* the defect of missing hatch boards was negligence because the ship at least should have known of their absence; and that is present here plus the additional present fact that here the defect was created, actively or by sufferance of the ship, whereas that inference is not present in *Hawn.* Certainly the negligence of Pope & Talbot in the *Hawn* case in permitting the slippery condition created by the stevedore to exist and in not having sufficient light was no more culpable than American Mail's failure to inspect the falls before lowering away. Pope & Talbot could not recover indemnity; *a fortiori* American Mail cannot recover indemnity.

Hagans vs. Farrell Lines, 237 F.2d 477 (CA 3rd). The ship furnished a defective winch to the stevedore and the stevedore, knowing the winch was defective, went ahead and used the winch. The ship was held not entitled to indemnity as the ship, like the ship here, created or permitted the defect. The Court said at page 483:

> "But if Lavino (stevedore, but would also be applicable to repairer) failed to perform its work properly, we are constrained to uphold that in the face of material violations, Farrell (ship) is not entitled to full indemnity and, of course, it cannot have contribution."

Amerocean S.S. Company, Inc. vs. Copp, supra. The ship, as did the ship here, created the defect; i.e., treating the deck with a rust preventor which made the deck slippery. Copp, the stevedore, knew of the slippery condition but sent Smith, a longshoreman, out on the deck without warning him and Smith slipped and fell. The ship was held not entitled to indemnity against Copp for the loss suffered by the ship by reason of Smith's injury and ensuing lawsuit. Certainly American Mail was no less culpable than *Amerocean* and, therefore, American Mail, on the basis of the *Amerocean* case, is not entitled to indemnity.

The doctrine of indemnity, both express or implied, as it is sought in this case, has taken many twists and turns in the last ten to fifteen years. It now appears that it is back to the basic principles as expressed in *Union Stockyard Company of Omaha vs. Chicago, Burlington & Quincy R. R. Co.*, 196 U.S. 217, 25 S. Ct. 226 (1905). In this case the railroad delivered a refrigerator car to the plaintiff stockyards. The car had a defect when it was delivered and the defect was one which the plaintiff could have found on reasonable inspection; similarly it could have been found by the stockyards on reasonable inspection. The plaintiff stockyards sent one of its employees in the car and the employee was injured by the defect and sued the stockyards and re-

covered. This was an implied indemnity suit by the stockyards against the railroad. A unanimous court denied indemnity and stated:

> "In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other.
>
> "In the present case the negligence of the parties has been of the same character. Both the railroad company and the terminal company failed, by proper inspection, to discover the defective brake. The terminal company, because of its fault, has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another."

Certainly the conduct of the ship here arose to no higher standard than the conduct of the stockyards, yet the stockyards was denied indemnity and so should the ship here be denied indemnity.

CONCLUSION

The appellant respectfully submits that the findings of fact and conclusions of law of the trial court are clearly erroneous in that the defendant-appellant, Albina Engine & Machine Works, was not guilty of a breach of contract or guilty of negligence and, therefore, no recovery can be had against it. In addition, even if

Albina were guilty of some fault, the ship operator, American Mail Line, is guilty of negligence, as well as failing to furnish a seaworthy vessel, both of which caused the injuries to the seamen and, therefore, American Mail Line, a tort feasor, cannot recover indemnity against Albina Engine & Machine Works.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY,

By ARNO H. DENECKE,
Attorneys for Appellant.

APPENDIX

Exhibits identified and authenticity admitted in Pre-trial Order (Tr. 32).

Plaintiff's exhibits as listed in the Pretrial Order, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and defendant's Nos. 10 and 11 were received (Tr. 44).